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SUPERIOR COURT
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BY: S. LANDINO

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

STATE OF ARIZONA,)	X P1300CR201001325
)	
Plaintiff,)	
)	RESPONSE re: STATE'S ADDENDUM
vs.)	TO RESPONSE TO MOTION TO
)	DISMISS/DISQUALIFY YAVAPAI
STEVEN DEMOCKER,)	COUNTY ATTORNEY'S OFFICE
)	
Defendant.)	
)	(Hon. Warren Darrow, David Mackey)
)	

The Defendant, by and through undersigned counsel, hereby Responds to the State's Addendum To Response to Motion to Dismiss/Disqualify Yavapai County Attorney's Office (hereinafter "Addendum").

In its Addendum, the state confirmed that as of July 22, 2011, the state did, in fact, have 12 of the 16 Rule 15.9(b) Sealed Orders issued by Judge Lindberg and the Yavapai County Clerk of Courts. The state claimed: "The Sealed Orders were found in a 'banker's box' that came from retired Deputy County Attorney Joseph Butner's YCAO office located in Camp Verde, AZ." This discovery by the state of the previously "unknown" Orders happened on the very same day this Court brought the issue up. Evidently, Mr. Butner still has an office in the Verde branch of YCAO after a long time being gone from that office. It strains credibility, however, that when

Mr. Butner left the YCAO, the state did not comb over what was in his files. In addition, were those twelve "15.9 Orders" mailed to the YCAO, or were they printed out from OnBase during the YCAO's clandestine invasion of that system? And, there is no indication who put the twelve "15.9 Orders" in Mr. Butner's banker box, or when.

1) The Distribution Red Herring.

The state is now burden shifting, and claims to know why the Defense never objected to the distribution list concerning some of the Rule 15.9 Orders in this case -- Orders the state previously did not admit that they had:

"The only reasonable explanation is that Judge Lindberg never intended the offices of the YCAO and the Victim Advocate be kept in the blind on his orders."

(Addendum, pg. 2).

"The Order states '(UNDER SEAL)' on its face and this can only mean Judge Lindberg intended the order sealed from the general public."

(*Id.*).

However, the state's point of view differs from Judge Mackey's March 16, 2011 "Ruling:"

The investigation also has revealed that the Clerk of the Court's distribution stamp on the face of a number of the "sealed" Rule 15.9 Orders reflects distribution to the County Attorney's Office and Victim Services. *Such distribution may have been contrary to the expectations of Judge Lindberg and the prior defense team.* Therefore, the Court is concerned that not only have "sealed" documents been viewed through remote electronic access sites but that "sealed" documents have been distributed to the Yavapai County Attorney's Office and Victim Services when *Judge Lindberg anticipated that such distribution would not occur.*

(Ruling, pg. 2, italics added).

Judge Mackey also had clearly announced -- back on March 16, 2011 -- that some of the Rule 15.9 Orders had, in fact, been distributed to the YCAO and to Victim Services. (*Id.*). The state said nothing about it. Thus, that distribution was not a mystery. However, the state now

claims that the twelve Rule 15.9 Orders were "unknown" until July 22, 2011, hidden away in a banker's box, in Joe Butner's Office, in the Verde YCAO Office.

If it is a fact at least some of the Rule 15.9 Orders had been distributed to YCAO and the Victim Witness, it is still nothing more than a red herring. Judge Mackey put it best:

The Clerk of Court believes that the OnBase remote electronic access that had been authorized to persons employed by the County Attorney's Office, Victim Services and the Public Defender's Office *did not grant the viewing of "ex parte" and "sealed" documents in this criminal case.*

(Ruling, pg. 3, italics added).

Judge Mackey analyzed three general categories of sealed documents that were viewed using the OnBase system:

First, and most concerning, there are instances in which it appears that Defense Counsel filed documents with the expectation that the documents and any subsequent order would be viewed only by the defense team and the Court pursuant to Rule 15.9, *Ariz.R.Crim.P.*

(Ruling, pg. 2, italics in original).

The fact remains that the mistaken distribution of a few 15.9 orders -- intended by Judge Lindberg or not -- did not mean that the state could illegally use OnBase to read the sealed ex parte motions, or a sealed ex parte transcript.

2) A History of Conflicting Statements from the State.

No review of the issue concerning the distribution of 15.9 Orders would be complete without a review of what the state has had to say on the subject of sealed ex parte hearings in this case, which included this statement:

"Never in the history of prosecution have so many *ex parte* pleadings been filed."

(State's Response to Motion to Dismiss/Disqualify, May 27, 2011, pg. 4, italics in original).

The state complained about lack of notice:

If the original Court had followed the proper procedure, then the defense's abuse of the Rule 15.9(b) process could have been addressed by the State and victims in a timely fashion. After the original Court sealed the July 6, 2009 Rule 15.9 proceeding and permitted many others to proceed *ex parte*, Defendant ceased providing the State (and thus the victims) notice.

(Id., pg. 10, ln. 1-4, italics in the original).

It is important to note that the state, in fact, already knew all about that *ex parte* activity -- the whole time -- because they were spying on the case via OnBase. Here is a summarized history of the *ex parte* issues, including what the state has had to say in the past:

- a) **July 6, 2009** -- the Defendant filed his "Defendant's Motion to File Rule 15.9

Applications *Ex Parte*, *In Camera*, and Under Seal, and for an *Ex Parte*, *In Camera*, Under Seal Hearing." ("15.9 Motion"). In that Motion, which was copied to Joe Butner, the Defendant wrote:

"Therefore, Mr. DeMocker, by and through counsel, hereby requests that this Court permit the filing of Rule 15.9 applications *ex parte*, *in camera*, and under seal and that the Court hold an *ex parte*, *in camera*, and under seal hearings to rule on counsel's initial Rule 15.9 applications on or before July 21, 2009."

- b) **July 6, 2009** -- Minute Entry Order from Judge Lindberg, which stated:

The Court this date having received Defendant's July 6, 2009 Motion to File Rule 15.9 Applications *Ex Parte*, *In Camera*, and Under Seal and for an Expedited *Ex Parte*, *In Camera*, Under Seal Hearing.

IT IS HEREBY ORDERED directing the Clerk of Court to forthwith seal Motion to File Rule 15.9 Applications *Ex Parte*, *In Camera*, and Under Seal and for an Expedited *Ex Parte*, *In Camera*, Under Seal Hearing.

Judge Lindberg's July 6, 2009 Minute Entry Order was copied to "Joseph C. Butner III," the lead attorney for the state at the time. Judge Lindberg's July 6 MEO was also copied to "Victim Services: Att. Marie Martinez." Thus, actual notice had been given to the state of the *ex parte* process.

- c) **July 15, 2010** -- "State's Memorandum re Ex Parte Communication," filed by Joe Butner.

In this Memorandum, Mr. Butner requested that all ex parte communications stop.

The state objects to any ex parte communication between Defendant, his counsel, and this Court relating to defense counsel's continued representation in light of the insurance issues. Defendant seeks future permission to communicate with this Court in an ex parte manner regarding this issue. It simply cannot be done.

(State's July 15, 2010 Memorandum, pg. 1).

- d) **July 21, 2010** -- Division 6, Minute Entry (Hon. Warren R. Darrow).

"Discussion takes place with regard to under seal minute entries. The Court clarifies that there is not to be any further distribution of any information that comes out of a sealed proceeding. The minute entries shall be distributed in an envelope and noted as under seal for all persons that receive them. The Court states that the minute entry dated July 16, 2010, which was copied to the Sheriff's Office shall not be distributed from the Sheriff's Office without further order of the Court."

- e) **October 14, 2010** -- "State's Motion for In Camera Review of Records Demanded

Pursuant to a Public Records Request Under A.R.S. § 39-121 And for Order Authorizing

or Enjoining the Release of Said Records," signed by Jack Fields, and distributed by

Rhonda Grubb (signature, pg. 6).

"DeMocker's defense counsel have raised the issue of DeMocker's fair trial rights regarding the release of the requested records, and stated that YCAO would be in violation of the ethics rules of the legal profession if the records are released. YCAO believes that the Court is in the best position to determine if release of the requested records does constitute a threat to DeMocker's rights. An in camera review of the material proposed for release is the best course of action to assure that the rights of the defendant in this matter are not impinged, and the right of the public to be informed of government activities is respected."

It is important to note that Attorney Fields viewed sealed ex parte documents 14 times, over a one year period, from September 2, 2009 to September 17, 2010. The October 14, 2010

"Fields Pleading"(supra), was filed *after* Attorney Jack Fields viewed the sealed ex parte documents, including a sealed ex parte transcript.

f) **September 8, 2010** -- "State's Motion for Reconsideration of Sanction Imposed July 26, 2010 and Request for Evidentiary Hearing and Motion to Unseal Records of Ex Parte Proceedings," signed and filed by Dennis McGrane. In that Motion the state said:

"Upon information and belief, Judge Lindberg conducted an ex parte hearing in which he found Defendant to be indigent. Judge Lindberg conducted this ex parte proceeding without proper notice to the State or the victims. At the conclusion of that hearing, it appears that Judge Lindberg ordered that the County pay the fees for defense experts, expert costs, transcription, and possibly attorney fees.

(*Id.*, pg. 3).

"Because the records of the July 10, 2009 ex parte proceeding in particular will likely shed further light on the situation regarding the financial sanction in this case and this hearing was improperly conducted without the state being present, the state moves that this hearing in particular, and all other unknown ex parte proceedings in general, be unsealed."

(*Id.*, pg. 4).

"Additionally, the State requests that the record of the ex parte proceedings that were conducted on July 10, 2009 (*and any other ex parte proceeding that have occurred without the State's knowledge*) be unsealed.

(*Id.*, pgs. 1-2, italics added).

This Motion was filed on September 8, 2010. It was just nine days later that Attorney Fields was viewing a sealed ex parte transcript which, in part, regarded expert fees and the Defendant's indigency. The Defendant urges the Court to review the original Motion to Dismiss/Disqualify, page 4, for a more thorough analysis of the September 8, 2010 Motion.

g) **December 3, 2010** -- "State's Motion for Change of Judge," signed by Joe Butner.

The state admitted that they were aware of the ex parte process on July 6, 2009.

(Motion, pg. 2). They received an after-the-fact minute entry of the July 10, 2009 ex parte Hearing. (*Id.*). The state further admitted that they received "a copy of one

subsequent order dated, July 23, 2009" regarding a 15.9 application/motions. (*Id.*).

More importantly, the state said:

On November 24, 2010, the state first learned of numerous ex parte motions and orders which were filed under seal and which remain under seal. From the information gleaned from the notations on the outside of the sealed envelopes, it appears that between the period of July 10, 2009 through March 23, 2010, no fewer than 29 ex parte motions and orders were filed by Defendant and/or issued by the Court. These ex parte proceedings appear to be in violation of the Rules of Criminal Procedure, the Arizona Constitution and the Canons of Judicial Conduct.

(*Id.*, emphasis added).

From the limited information that the state has been able to review, it appears that improper *ex parte* contact may have occurred. The state was only notified one time that Defendant requested appointment of an expert pursuant to Rule 15.9. Upon closer examination of that one request, it appears that Judge Lindberg may have issued a "blanket" finding that every request under the guise of Rule 15.9 was to be decided *ex parte*. (*Id.*, pg. 4, italics in original)

However, as we recently discovered, Joe Butner had 12 of the 16 "15.9 Orders" in his office! (State's "Addendum," *supra*). And, since we now know that the state had been spying on the ex parte motions and transcript, for a long time, none of this information in the 10.1 Motion makes any sense. What is contained in the 10.1 Motion is not an accurate statement of facts.

In its Addendum, the state was quick to point out that the Defense never objected to the distribution of the 15.9 Orders. That is burden shifting. The duty really was on the YCAO to report to somebody -- anybody -- that they were receiving, viewing, and printing documents they should not have received. They never did.

h) **December 3, 2010** -- The December 2, 2010 Affidavit by YCAO Attorney Jeff Paupore, is attached to "State's Motion for Change of Judge." The Affidavit is signed by Jeff Paupore, and notarized by YCAO employee Peggy Wagner. The Affidavit from Mr. Paupore, stated, in the applicable part (italics are added):

2. On November 24, 2010, with permission from the court, your affiant reviewed court files numbered 3 and 4 and an accompanying expando containing approximately 29 sealed manila envelopes.
3. In numerous locations in the court files, *the Clerk, at the direction of Judge Lindberg, inserted pages titled PURGED on Rule 15.9 proceedings with instructions that no one could review the subject pleading without a prior order from the court.*
4. *Your affiant reviewed the State's files and could not locate any of the purged and sealed Rule 15.9 pleadings except as noted on Exhibits B through F attached.*
5. *Your affiant reviewed the "OnBase" records and could not locate any of the sealed Rule 15.9 applications or orders.*
6. Upon information and belief, your affiant believes Defendant and Judge Lindberg failed to notify the State and the victims of these ex parte proceedings.
7. *Until the State sought and gained the Court's permission to review the Court's sealed files, the State had no knowledge or notice that Defendant and/or his attorneys met with Judge Lindberg ex parte on numerous occasions.*

The Court should note the language choice in the 10.1 Motion, "from the information gleaned," "it appears," and "upon closer examination." These are important word choices, because they are not truthful. Note the language in the Mr. Paupore's Affidavit: "Upon information and belief," and "the State had no knowledge or notice that Defendant and/or his attorneys met with Judge Lindberg ex parte on numerous occasions." According to Jeff Paupore's Affidavit it was not until November 24, 2010 the state discovered the ex parte envelopes. In the 10.1 motion Joe Butner states they were only notified of ONE ex parte hearing. These are not accurate statements.

g) **June 6, 2011** -- At a Pre-trial Hearing, Mr. Paupore said:

No, Your Honor. *We did not know.* And Mr. Butner and I did not - - in any

discussions with any of the people, according to the clerk's report who viewed or printed the documents, *we simply were not aware of it*. It was not brought to our attention. And that's why I made the avowal. It just never happened. And - - you know - - the . . .

Unequivocally, Your Honor. I'm telling you that of the 15.9 documents that were viewed, *we did receive the initial motion*. That was the request to do the closed hearings. Of course, there was no confidential information that I'm aware of in that pleading we received.

But as far as the orders appointing certain experts, *Mr. Butner and I had no knowledge of that, when it was happening*, when they were reviewed by the people. *That information was never brought to our attention*.

And, further, *we simply didn't have any clue. We did not know it was happening*. Now, the staff members probably assumed that we knew what was going on. *I don't know*. But neither Mr. Butner and I spoke to any staff member about any 15.9 documents. *The -- it just never happened*.

Now, our paralegals -- we had two of them doing this process -- did some of the viewing and printing. But it was not at our direction. And I do not recall at all ever having any conversation about the 15.9 hearings. *It just never occurred*.

And to answer Mr. Williams question, as a supervisor, technically, I was supervisory over all the people who looked at it given my position with the county attorney's office at the time. So he has my name and he has my avowal.

(June 6, 2011, pg. 20, ln 1-25, pg. 21, ln. 1-23, italics added).

Those statements should settle the matter, and the Defendant's Motion should be granted.

Conclusion

Judge Mackey was concerned about the Defendant's Right to a fair trial:

To the extent the records are considered "remote electronic access user records" pursuant to Rule 123(e)(8), *Arizona Supreme Court Rules*, the Court finds that the Defendant's right to a fair trial outweighs the privacy interest of the remote electronic access user.

(Judge Mackey's Ruling, *supra*, pg. 3, italics in original).

The state's explanations for their misdeeds concerning ex parte motions and transcript are conflicting, and frankly are not trustworthy. The Defendant cannot get a fair trial so long as the

Yavapai County Attorney is involved. Respectfully, an oral argument is NOT needed, when the Court has so much actual evidence against the state -- including the state's confessions¹ regarding viewing and printing sealed ex parte documents. All of this came from the state directly.

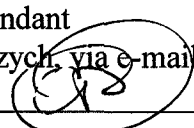
A court has the inherent power to sanction a party or its lawyers if it acts in "willful disobedience of a court order ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," as well as for "willful[] abuse [of the] judicial processes." Gomez v. Vernon, 255 F.3d 1118, 1133 -1134 (C.A.9 Wash. 2001).

For the above-stated reasons, and the appearance of impropriety, the Defendant is asking the Court to DISMISS THE CASE WITH PREJUDICE. In the alternative, the Court should DISQUALIFY the Yavapai County Attorney from the Defendant's pending case.

RESPECTFULLY SUBMITTED this July 28, 2011.



Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Warren Darrow, Division PTB, Hon. David Mackey, Yavapai County Presiding Judge
Jeff Paupore, Steve Young, Yavapai County Attorney's Office
The Defendant
Greg Parzych, via e-mailed .pdf
by:  _____

¹For a more complete discussion about the state's confessions, see: "*Reply: Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office*," pgs. 1-4.